DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 06-0364
Utility Receipts Tax
For Tax Years 2003-05

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ISSUES

I. Utility Receipts Tax—Federal Tariff and Revenue Pooling Systems

Authority: IC § 6-2.3-1-4; IC § 6-2.3-1-6; IC § 6-2.3-2-1; IC § 6-2.3-3-2; IC § 6-2.3-3-4; IC § 6-8.1-5-1; Telecommunications Act of 1996, 47 U.S.C. § 151 et seq. (2007); 47 U.S.C. § 152 (2007); 47 U.S.C. § 158 (2007); 47 U.S.C. § 159 (2007); 47 U.S.C. § 254 (2007); 47 C.F.R. § 54.712 (2005); 47 CFR § 61.3 (2005); 47 C.F.R. § 64.901 (2005); 47 C.F.R. § 64.2401 (2005); 47 C.F.R. § 69.104 (2005); 47 C.F.R. § 69.115 (2005); 47 C.F.R. § 69.131 (2005); 47 C.F.R. § 69.158 (2005); Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report and Order, 12 F.C.C.R. 8776 (1997) (Universal Service Order).

Taxpayer protests the imposition of utility receipts tax on funds relating to the Federal Tariff and Revenue Pooling systems.

II. Utility Receipts Tax—Indiana Tariff and Revenue Pooling Systems

Authority: IC § 6-2.3-1-4; IC § 6-2.3-1-6; IC § 6-2.3-2-1; IC § 6-2.3-3-4; IC § 6-8.1-5-1; Order, Cause No. 40785 (Ind. Util. Regulatory Comm'n June 30, 1998); Order, Cause No. 40785 (Ind. Util. Regulatory Comm'n Dec. 30, 1997); Phase II, Cause No. 38269 (Ind. Util. Regulatory Comm'n Dec. 18, 1992); Order, Cause No. 38269 (Ind. Util. Regulatory Comm'n Apr. 12, 1989); Final Order, Cause No. 42144 (Ind. Util. Regulatory Comm'n Mar. 17, 2004).

Taxpayer protests the imposition of utility receipts tax on funds relating to the Indiana Tariff and Revenue Pooling systems.

III. Utility Receipts Tax—Other

Authority: IC § 6-2.3-1.4; IC § 6-2.3-2-1; IC § 6-8.1-5-1.

Taxpayer protests the imposition of utility receipts tax.

STATEMENT OF FACTS

Taxpayer is a telecommunications company providing telephone services and equipment, cellular phone equipment, cable and digital telephone services, and internet services to Indiana customers. Taxpayer did not include gross receipts received from state and federal tariff and revenue pooling "systems" for providing services in rural communities or those received from telephone accessories and equipment sales. After an audit, the Indiana Department of Revenue ("Department") assessed additional Utility Receipts Tax ("URT"), penalties, and interest for the tax years 2003, 2004, and 2005. Taxpayer protested this assessment. A hearing was held and this Letter of Findings results.

I. Utility Receipts Tax—Federal Tariff and Revenue Pooling Systems

DISCUSSION

Notices of proposed assessments are prima facie evidence that the department's claim for unpaid taxes is valid**.** IC § 6-8.1-5-1(b). The taxpayer has the burden of proving that the department incorrectly imposed the assessment. *Id*.

The URT is imposed by IC § 6-2.3-2-1 as follows:

> An income tax, known as the utility receipts tax, is imposed upon the receipt of:
>
> (1) the entire taxable gross receipts of a taxpayer that is a resident or a domiciliary of Indiana; . . .

"Gross receipts" for purposes of the Indiana's URT is defined at IC § 6-2.3-1-4 as follows:

> "Gross receipts" refers to anything of value, including cash or other tangible or intangible property that a taxpayer receives in consideration for the retail sale of utility services for consumption before deducting any costs incurred in providing the utility services.

In summary, the URT is an income tax imposed on the receipts from retail sales of utility services for consumption by the purchaser. The utility services subject to tax include telecommunication services.

Taxpayer protests the imposition of URT on receipts in the following accounts: "End User Revenue-Interstate," "Interstate Revenues-NECA," "Interstate Revenues-USF," "Interstate Revenue-FUSC," and "Special Access DSL." The receipts in these accounts all relate to the National Exchange Carrier Association ("NECA") and the Universal Service Fund ("USF") federal tariff and revenue pooling systems. (Taxpayer refers to these systems as "cost recovery" pooling systems. The Department has considered this definition and does not agree. They are revenue pooling systems where revenues are pooled and distributed based on the companies' total revenues and the costs associated with providing services to high cost customers, low-income customers, schools, libraries, or rural health care providers to ensure that fair and

affordable service is provided to all customers--i.e., "universal service." Thus, the "cost recovery" systems are revenue reallocation and apportionment systems and as such will be referred to as "revenue pooling systems.")

The Federal Communication Commission ("FCC") was granted the authority to create these pooling systems to ensure the availability of universal telecommunication services in the Telecommunications Act of 1934, as amended ("Act"). *See* Telecommunications Act of 1996, 47 U.S.C. § 151 et seq. (2007). The NECA and USF pooling systems are used to collect and distribute telecommunication company revenues in accordance with the Act. The Act provides that "[e]very telecommunications carrier that provides interstate telecommunications services shall contribute . . . to . . . mechanisms established by the [FCC] to preserve and advance universal service." Telecommunications Act of 1996, 47 U.S.C. § 254(d) (2007).

The NECA and USF pooling systems receive contributions from and give distributions to the telecommunication companies to provide assistance to companies servicing high cost and low-income customers. The NECA and USF pooling systems have different qualifications for the companies receiving funds based on the percentage of certain types of high cost or low-income customers that the company services such as the number of rural customers, schools, and medical providers serviced. Therefore, one company may receive funds from only the NECA, from only the USF, or from both depending on the percentage of those types of customers serviced.

The NECA and USF make distributions (discussed in subparts B and C below) to companies from the NECA and USF revenue pools net of the amount, if any, that the companies have collected from customers. Each telecommunication company may collect a certain amount as an end user revenue charge (discussed in subpart A below) from each customer and hold this amount until the determination is made on what, if anything, the company is to contribute to the pools.

For example (and for illustrative purposes only), taxpayer collects $10.50 from each customer and holds these funds until the NECA/USF determines the amount, if any, to be distributed to taxpayer. If the NECA/USF determines that taxpayer is to received $10.50 or more for each customer, then taxpayer retains this $10.50 and receives distributions for the amount over the $10.50 from the NECA/USF revenue pools. However, if the NECA/USF determines that that taxpayer is to receive less than $10.50 for each customer, then the taxpayer remits those revenues to the NECA/USF to fund the pools.

The Act contains a "state tax savings provision" which provides that "nothing in this Act or the amendment made by this Act shall be construed to modify, impair, or supersede, or authorize the modification, impairment, or supersession of, any State or local law pertaining to taxation . . . ." Telecommunications Act of 1996 § 601(c)(2), 47 U.S.C. § 152 note (2007) (Applicability of Consent Decrees and Other Law). Therefore, Indiana tax law controls the question whether or not these receipts are subject to the URT.

Taxpayer protests the imposition of URT on receipts received from end user revenue charges that are collected from customers and contributed to the federal tariff and pooling systems (discussed in subpart A), on distributions that are received from the federal tariff and pooling systems

(discussed in subpart B), and on receipts allocated for a special access account (discussed in subpart C).

A. "End User Revenue-Interstate" and "Interstate Revenue-FUSC"

1. "End User Revenue-Interstate"

Taxpayer protests the imposition of URT on gross receipts in the "End User Revenue-Interstate" account that taxpayer receives from customers under a separately stated end user revenue charge ("Interstate Access Charges"). Taxpayer has the end user revenue charge listed on the customers' bills as a "Basic Monthly Service" charge. Taxpayer may state separately an end user revenue charge for the amount it collects under the NECA tariff and revenue pooling system, as discussed above. The receipts in the "End User Revenue-Interstate" account are those end user revenue charges that were collected from the customers and were retained by taxpayer under the NECA tariff and pooling system.

For example (and for illustrative purposes only), taxpayer collects $6.50 from each customer and holds these funds until the NECA determines the amount, if any, to be distributed to taxpayer. If the NECA determines that taxpayer is to receive $6.50 or more for each customer, then taxpayer retains this $6.50 and receives a distribution for the amount over $6.50 from the NECA revenue pool. However, if the NECA determines that the taxpayer is to receive less than $6.50 for each customer, then the taxpayer remits the required revenues to the NECA to fund the pool.

Taxpayer retained the amounts collected by the Taxpayer in the "End User Revenue-Interstate" account and received additional distributions from the NECA revenue pool. Since these charges were collected from the customers in a separately stated line item charge and were approved by the FCC, taxpayer asserts these receipts are a "tax, fee, or surcharge" collected from the customer not subject to the URT under IC § 6-2.3-3-4.

As stated previously, the URT is an income tax imposed on the gross receipts from retail sales of utility services for consumption by the end user. Gross receipts mean adding everything received by a taxpayer in consideration for the retail sale of utility services for consumption without subtracting any of the costs of providing the utility services. However, an exemption from the URT exists for "tax, fee, or surcharge" collections in IC § 6-2.3-3-4, as follows:

> (b) Gross receipts do not include collections by a taxpayer of a tax, fee, or surcharge that is:
> (1) approved by the Federal Communications Commission or the utility regulatory commission; and
> (2) stated separately as an addition to the price of telecommunications services sold at retail.

In other words, receipts that result from the collection of a "tax, fee, or surcharge" that was approved by the FCC or the IURC and is stated as a separate line item on the customers' bill are exempt from the URT.

According to the "Truth-in-Billing Requirements" for telecommunications companies, telephone bills must state all charges separately with clear and accurate descriptions. *See* 47 C.F.R. § 64.2401 (2005). Since all charges are to be stated separately, the mere fact that a charge is stated separately does not give it automatic exemption under IC § 6-2.3-3-4. The charge must be for the collection of a tax, fee, or surcharge that is approved by the FCC or IURC to be exempt.

The end user revenue charge is not a "tax, fee or surcharge" approved by the FCC. The end user revenue charge is not a "fee" because the FCC has not included it in either of the listed schedules of fees. *See* Telecommunications Act of 1996, 47 U.S.C. § 158-9 et seq. (2007). The end user revenue charge is not a "tax" charged to customers by the Federal or State government. The end user revenue charge is not a "surcharge." If the FCC wanted to designate the charge as a surcharge, it would have been thus named. For example, 47 C.F.R. Section 69 consistently refers to the "special access surcharge," which the FCC approved as a mandatory "surcharge" to be included on a customer's bill for the cost of certain line terminations. 47 C.F.R. § 69.115 (2005). The end user revenue charge is referred to as such, a "charge." *See* 47 C.F.R. § 69.104(a) (2005). Specifically "[a] charge that is expressed in dollars and cents per line per month shall be assessed upon end users that subscribe to local exchange telephone service . . . ." *Id*. The FCC defines a "charge" as "the price for service based on tariffed rates." 47 CFR § 61.3(j) (2005). Accordingly, the end user revenue charge is nothing more than a "charge" the customer pays for telecommunication service. Therefore, since the end user revenue does not result from the collection of a tax, fee, or surcharge approved by the FCC, it does not fall under the exemption and is subject to the URT.

2. "Interstate Revenue-FUSC"

Taxpayer protests the imposition of URT on receipts in the "Interstate Revenue-FUSC" account that taxpayer collects from customers under a separately stated end user revenue charge ("Federal Universal Service Fee") for the Universal Service Administrative Company's ("USAC") cost of administering the USF. (Taxpayer asserts that these charges are collected to cover the administrative costs and funding of the pools; regardless, the same analysis applies.) The FCC created the USAC to administer the USF. The USAC charges the taxpayer based on the percentage of revenues it collects under the tariff and pooling systems to cover the USAC's administration costs. Taxpayer has the end user revenue charge listed on the customers' bills as a "Basic Monthly Surcharge." Since these charges were collected from the customers in a separately stated line item charge and were approved by the FCC, taxpayer asserts that this revenue is a "tax, fee, or surcharge" collected from the customer not subject to the URT under IC § 6-2.3-3-4.

As stated previously, receipts that result from the collection of a "tax, fee, or surcharge" that was approved by the FCC or the IURC and is stated in a separate line item on the customers' bill are exempt from the URT.

As provided above, telephone bills must state all charges separately with clear and accurate descriptions under 47 C.F.R. § 64.2401 (2005). Since all charges are to be stated separately, the mere fact that a charge is stated separately does not give it automatic coverage under IC § 6-2.3-

3-4. The charge must be for the collection of a tax, fee, or surcharge that is approved by the FCC or IURC to be exempt.

Taxpayer does not cite any statute or regulation as to the authority for calling this charge a fee or surcharge. The mere fact that Taxpayer has labeled the charge as such does not determine the nature of the transaction. Therefore, the Department will look to the underlying statutes to determine the nature of the charge.

The end user revenue charge is not a "tax, fee or surcharge" approved by the FCC. The charge is not a "fee" approved by the FCC because the FCC has not included it in either of the listed schedule of fees. *See* Telecommunications Act of 1996, 47 U.S.C. § 158-9 et seq. (2007). The charge is not a "tax" charged to customers by the Federal or State government. The charge is not a "surcharge." If the FCC wanted to designate the charge as a surcharge, it would have been thus named. For example, 47 C.F.R. Section 69 consistently refers to the "special access surcharge," which the FCC approved as a mandatory "surcharge" to be included on a customer's bill for the cost of certain line terminations. 47 C.F.R. § 69.115 (2005). The "Federal Universal Service Charge" is consistently referred to as "charge" throughout the Act and the relating Federal Regulations. *See* 47 C.F.R. § 54.712(a) (2005) and 47 C.F.R. §§ 69.131, 158 (2005). Specifically, the FCC provides that "[f]ederal universal service contributions may be recovered through interstate telecommunications-related charges to end users." 47 C.F.R. § 54.712(a) (2005). An "end user charge" shall be used by a company "to the extent the company makes contributions to the Universal Support Mechanisms" and "seeks to recover some or all of the amount of such contribution." 47 C.F.R. §§ 69.131, 158 (2005). The FCC defines a "charge" as "the price for service based on tariffed rates." 47 CFR § 61.3(j) (2005). Moreover, the FCC explicitly stated that it was not adopting an "end-user surcharge" for the recovery of these contributions. Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report and Order, 12 F.C.C.R. 8776, 9210-11, at para. 853 (1997) (Universal Service Order). Accordingly, the end user revenue charge is nothing more than a "charge" the customer pays for telecommunication service. Therefore, since the end user revenue charge is not a tax, fee, or surcharge approved by the FCC, it does not fall under the exemption and is subject to the URT.

B. "Interstate Revenues-NECA" and "Interstate Revenues-USF"

Taxpayer protests the imposition of URT on receipts in the "Interstate Revenues-NECA" and "Interstate Revenues-USF" accounts that taxpayer receives from the NECA and USF for providing services to high cost and low-income customers. The receipts in Taxpayer's "Interstate Revenue-NECA" and "Interstate Revenues-USF" accounts are the distributions the taxpayer received from the NECA and USF revenue pools. Taxpayer receives distributions from the NECA and USF revenue pool net of the amount that it has collected from its customers.

For example (and for illustrative purposes only), taxpayer collects $10.50 from each customer and holds these funds until the NECA/USF determines the amount, if any, to be disturbed to taxpayer. If the NECA/USF determines that taxpayer is to receive $10.50 or more for each customer, then taxpayer retains this $10.50 and receives a distribution for the amount over $10.50 from the NECA/USF revenue pools. However, if the NECA/USF determines that that

taxpayer is to receive less than $10.50 for each customer, then the taxpayer remits the required funds to the NECA/USF to fund the pools.

The NECA and USF determined that Taxpayer was to receive more than the amount received from each customer and distributed funds from the NECA and USF revenue pools to Taxpayer. Taxpayer recorded these distributions in the "Interstate Revenue-NECA" and "Interstate Revenues-USF" accounts, respectively. Since these receipts are from the NECA and USF revenue pools, Taxpayer asserts these funds are revenue settlements between telecommunication companies and are not retail revenues subject to the URT. Additionally, Taxpayer argues if these distributions are subject to the URT it would result in double taxation.

1. Receipts from the Revenue Pools

As stated previously, the URT is an income tax imposed on the receipts from retail sales of utility services for consumption by the purchaser. Further, gross receipts for purposes of the Indiana's URT include "anything of value . . . that a taxpayer receives in consideration for the retail sale of utility services for consumption before deducting any costs incurred in providing the utility services." IC § 6-2.3-1-4. "Receives," as defined for the purposes of the Indiana's URT, includes "the payment of a taxpayer's expenses, debts, or other obligations by a third party for the taxpayer's direct benefit." IC § 6-2.3-1-6(2). In other words, when a taxpayer provides utility services and directly benefits from something it receives for its expenses, debts, or obligations, then that taxpayer has gross receipts that are subject to the URT.

Taxpayer receives distributions from the NECA and USF revenue pools to recover its expenses and obligations of providing retail utility services for consumption to rural customers in Indiana. Thus, the NECA and USF are third parties paying something of value for Taxpayer's expenses and obligations from which Taxpayer receives a direct benefit. Therefore, the receipts in the "Interstate Revenues-NECA" and "Interstate Revenue-USF" accounts are gross receipts subject to the URT.

2. Double Taxation

Taxpayer maintains that imposing the URT on the receipts in the "Interstate Revenues-NECA" and "Interstate Revenues-USF" accounts would subject them to double taxation. Double taxation means that the same receipts are subjected to the same tax twice--once on receipt from the customers and once again on receipt by Taxpayer. Since every telecommunications carrier that provides interstate telecommunications can contribute to the NECA and USF systems, then telecommunication companies located all over the United States contribute to the pools. As a result, the likelihood of the taxpayer receiving revenues contributed by Indiana taxpayers who were subject to the URT is impossible to determine with any accuracy.

Moreover, IC § 6-2.3-3-2 provides:

> Notwithstanding any other provision of this article receipts that would otherwise not be taxable under this article are taxable receipts under this article to the extent that the

> amount of the nontaxable receipts are not separated from the taxable receipts on the records or returns of the taxpayer.

Accordingly, even if Taxpayer could somehow devise a formula to identify the small amount that was definitely subjected to double taxation, Taxpayer has not kept these amounts separate in their records or on the returns. Thus, pursuant to IC § 6-2.3-3-2, the receipts, even if proved nontaxable, are taxable receipts at this point.

Furthermore, the NECA and USF require companies to report their monthly total revenues as well as expenses involved in providing telecommunications services to customers. The NECA and USF base the companies' contributions to and distributions from the pool on the total revenues and expenses reported. The NECA and USF equations include a line in the expenses for taxes. When this fact is taken in consideration with the fact that the FCC included a state tax savings provision, as provided above, then it can be assumed that the FCC already gave this matter consideration and found the State could fairly tax these receipts. Therefore, the receipts in the "Interstate Revenues-NECA" and "Interstate Revenues-USF" accounts were not subjected to double taxation and are subject to the URT.

C. "Special Access DSL"

Taxpayer protests the imposition of URT on receipts in the "Special Access DSL" account. The "Special Access DSL" account contains amounts that the Taxpayer's regulated division allocates as from its non-regulated division for DSL services provided. The FCC requires the taxpayer to record and report these adjustments as part of a set of accounting safeguards and cost allocation procedures used to ensure that costs and revenues for the tariffed, or regulated, services are being properly recognized. *See* Telecommunications Act of 1996, 47 U.S.C. § 254(k) (2007) and 47 C.F.R. § 64.901(c) (2005). The amount in this account is derived by multiplying the number of each type of non-regulated service offered times the FCC set dollar figure for that type of service. For example (and for illustrative purposes only), taxpayer has 10 customers who subscribe to voice data DSL services for $20.00. The NECA has predetermined that since the non-regulated service provided uses the same lines as the regulated service, then $5.00 of this non-regulated service should be attributed to the regulated service. Thus, the NECA would require taxpayer to report $50.00 [10 multiplied by $5.00 equals $50.00] as revenue in a special access revenue account and $50.00 in an expense account. Then, the NECA uses this information, as reported to it in these special accounts, in its determination of the amount the companies will contribute to or will receive in distributions from the pool.

As stated previously, the URT is an income tax imposed on the gross receipts from retail sales of utility services for consumption by the purchaser. Further, gross receipts mean adding everything received by a Taxpayer in consideration for the retail sale of utility services for consumption without subtracting any of the costs of providing the utility services.

Taxpayer has reported and subjected to the URT the revenues it receives from its customers for these non-regulated services. The amount in the "Special Access DSL" account results from a bookkeeping entry that the Taxpayer is required to report to the NECA. The amounts recorded in the "Special Access DSL" account are not receipts subject to the URT.

FINDING

Taxpayer's protest is sustained for receipts in the "Special Access DSL" account (subpart C). Taxpayer's protests for all other accounts resulting from the federal tariff and pooling systems (subparts A and B) are denied.

II. Utility Receipts Tax—Indiana Tariff and Revenue Pooling Systems

DISCUSSION

Taxpayer protests the imposition of URT on receipts in the following accounts: "End User Revenue-Intrastate," "Intrastate-TDWF," and "Indiana High Cost Fund." The receipts in these accounts all relate to two Indiana tariff and pooling systems, Indiana's Traditional DEM Weighing Fund ("TDWF") and the Indiana High Cost Fund ("IHCF"). The TDWF and IHCF were created by the Indiana Utility Regulation Commission ("IURC") to promote universal telecommunication service. The IHCF and TDWF were established prior to the enactment of the Telecommunications Act of 1996 and will be administered under the two separate pooling systems until the IURC forms the Indiana Universal Service Fund ("IUSF"), which will replace the IHCF and TDWF.

The TDWF and IHCF pooling systems receive contributions from and give distributions to the telecommunication companies to assist in providing service to customers who are more costly to service. The TDWF and IHCF pooling systems have different qualifications for the companies receiving funds based on the percentage of certain types of customers the company services such as the number of rural customers, schools, and medical providers serviced. Therefore, one company may receive funds from only the TDWF, from only the IHCF, or from both depending on the percentage of those types of customers serviced.

Companies collect end user revenue charges from each customer to fund the IHCF and TDWF revenue pools, respectively. These end user revenue charges are remitted to the funds each month (as discussed in subpart A below) regardless of the fact that it may later receive a distribution from the pools (as discussed in subpart B below). For example (and for illustrative purposes only), taxpayer collects $6.50 from each customer in an end user revenue charge. Therefore, taxpayer remits $6.50 per customer to the TDWF/IHCF. Then the TDWF/IHCF determines, based on taxpayer's service group, that taxpayer is to receive a $4.00 per customer distribution from the respective pool.

Taxpayer protests the imposition of URT on receipts received from end user revenue charges that are collected from customers and contributed to the Indiana tariff and pooling systems (discussed in subpart A) and distributions that are received from the Indiana tariff and pooling systems (discussed in subpart B).

A. "End User Revenue-Intrastate"

Taxpayer protests the imposition of URT on gross receipts in the "End User Revenue-Intrastate" account that taxpayer receives from customers under a separately stated end user revenue charge

("Intrastate Access Charges") on each customer's bill. Taxpayer charges this separately stated end user revenue charge to customers to recover the funds it contributes to the TDWF and IHCF to fund the pooling systems. Since these charges were collected from each customer in a separately stated line item and were approved by the IURC, taxpayer asserts these receipts are a "tax, fee, or surcharge" collected from the customer not subject to the URT. As stated previously, receipts that result from the collection of a "tax, fee, or surcharge" that was approved by the FCC or the IURC and is stated in a separate line item on the customers' bill are exempt from the URT.

The end user revenue charges collected by the Taxpayer are not a "fee, tax, or surcharge." In all orders issued on this matter, the end user revenue charge is consistently referred to as such, a "charge." *See generally* Order, Cause No. 40785 (Ind. Util. Regulatory Comm'n June 30, 1998); Order, Cause No. 40785 (Ind. Util. Regulatory Comm'n Dec. 30, 1997); Order, Cause No. 38269-S2 (Ind. Util. Regulatory Comm'n Dec. 18, 1992); Order, Cause No. 38269 (Ind. Util. Regulatory Comm'n Apr. 12, 1989). In fact, when it was proposed that the charge be adopted as an end user "surcharge," the IURC declined the proposal. Order, Cause No. 40785 slip op. at 17 (Ind. Util. Regulatory Comm'n June 30, 1998). Accordingly, if the IURC had wanted to designate the end user revenue charge as a "surcharge," it would have adopted the proposal and designated it as such.

For example, in Final Order, Cause No. 42144 (Ind. Util. Regulatory Comm'n Mar. 17, 2004), as amended, ("2004 Order"), which states that as of March 1, 2005, all intrastate telecommunication carriers must bill a mandatory "surcharge" to their end users to make monthly contributions to the Indiana Universal Service Fund ("IUSF"), the IRUC designated a surcharge. Final Order, Cause No. 42144, slip op. at 6 (Ind. Util. Regulatory Comm'n Mar. 17, 2004). Even though the IUSF has been authorized, it has not been formed because the 2004 Order has been through numerous appeals. The IRUC anticipates that the IUSF will be enacted sometime in the fourth quarter of 2007.

Therefore, the end user revenue charge is merely a "charge" for the price of service. Since the end user revenues received by Taxpayer are not from the collection of a tax, fee, or surcharge approved by the FCC and separately stated, the revenues do not fall under the exemption and are subject to the URT.

B. "Intrastate-TDWF" and "Indiana High Cost Fund"

Taxpayer protests the imposition of URT on receipts in the "Intrastate-TDWF" and "Indiana High Cost Fund" accounts that Taxpayer received from the TDWF and IHCF. The receipts in Taxpayer's "Intrastate-TDWF" and "Indiana High Cost Fund" accounts are the distributions that Taxpayer received from the TDWF and IHCF revenue pools, respectively. Since these receipts are from the TDWF and IHCF revenue pools, Taxpayer asserts these funds are revenue settlements between telecommunication companies and are not retail revenues subject to the URT. Additionally, Taxpayer argues if these distributions are subject to the URT it would result in double taxation.

1. Receipts from the Revenue Pools

As stated previously, the URT is an income tax imposed on the gross receipts from retail sales of utility services for consumption by the purchaser. Further, gross receipts mean adding everything received by a taxpayer in consideration for the retail sale of utility services for consumption without subtracting any of the costs of providing the utility services. Furthermore, when a taxpayer provides utility services and directly benefits from something it receives for its expenses, debts, or obligations, then the taxpayer has gross receipts that are subject to the URT.

Taxpayer receives distributions from the TDWF and IHCF revenue pools to recover its expenses and obligations of providing retail utility services for consumption to rural customers in Indiana. Thus, the TDWF/IHCF is a third party paying something of value for Taxpayer's expenses and obligations from which the Taxpayer receives a direct benefit. Therefore, the receipts in the "Interstate Revenues-TDWF" and "Indiana High Cost Fund" accounts are gross receipts subject to the URT.

2. Double Taxation

Taxpayer maintains that imposing the URT on the gross receipts in the "Intrastate-TDWF" and "Indiana High Cost Fund" accounts would subject them to double taxation. Double taxation means that the same receipts are subjected to the same tax twice--once on receipt from the customers and once again upon distribution and receipt by Taxpayer.

Taxpayer collects end user revenue charges from customers to recover the contributions taxpayer makes to the TDWF, IHCF, and IUSF funding the respective revenue pools. Since the receipts in the "Intrastate-TDWF" and "Indiana High Cost Fund" accounts are distributions from these pools, the receipts received have already been subject to the URT once when they were collected from the end users, as discussed in subpart A above.

However, the TDWF and IHCF require companies to report their total revenues as well as expenses involved in providing telecommunications services to customers. The TDWF and IHCF base the companies' contributions to and distributions from the pool on the total revenues and expenses reported. Since the TDWF and IHCF equations include a line in the expenses for taxes, it can be concluded that the IURC already gave this matter consideration and found the State could fairly tax these receipts.

Nonetheless, subjecting the revenues to the URT once on collection from the customers before contribution to the pools and to the URT a second time upon distribution from the pools could be considered as double taxation. Therefore, gross receipts for URT purposes will only include the greater of the end user revenues collected in the "End User Revenue-Intrastate" account (as discussed in subpart A above) or the distributions received from the TDWF and IHCF revenue pools in the "Intrastate-TDWF" and "Indiana High Cost Fund" accounts (as discussed in this subpart).

FINDING

Taxpayer's protest is denied in part.

III. Utility Receipts Tax—Other

DISCUSSION

Taxpayer protests the imposition of URT on funds in the accounts, "Cellular Revenue-Phone Accessories" and "Enhanced PCS Revenue-Phones and Accessories."

A. "Cellular Revenue-Phone Accessories"

Taxpayer and the Department agree that according to the Taxpayer's business practices the funds in the account titled "Cellular Revenue-Phone Accessories" are from commissions received from a cellular phone company. Taxpayer contracts with a cellular phone company to receive compensation for subscribing customers to the cellular phone company's services. Taxpayer receives a set amount for each customer that subscribes to a cellular phone service account. The rates vary depending on the type of account to which the customer subscribes. For example (and for illustrative purposes only), if taxpayer gets 10 customers to subscribe to the $30.00 monthly service plan, then taxpayer will receive $20.00 [10 customers multiplied by $2 equals $20.00].

As stated previously, the URT is an income tax imposed on the gross receipts from retail sales of utility services for consumption by the purchaser. In this case, the receipts from a retail sale of utility services are those resulting from providing the cellular phone service. Accordingly, the cellular phone company is the seller of the taxable utility service. Thus, the cellular phone company pays URT on the total monies received from the customers and does not receive a deduction for the amount it pays to Taxpayer for finding subscribers. Therefore, the revenues in the "Cellular Revenue-Phone Accessories" account are not from retail utility services and are not subject to the URT.

B. "Enhanced PCS Revenue-Phones and Accessories"

Taxpayer maintains that phones and phone accessories sales should not be subject to the URT. Taxpayer sells phones and phone accessories to the customers that are receiving the services from another company, as discussed above. Therefore, these receipts were not from the retail sale of a utility service and are not subject to the URT.

FINDING

The taxpayer's protest is sustained.

AB/WL/DK-July 2, 2007